(4) (3)

Nos. 94-923, -924

In the

Supreme Court of the United States

OCTOBER TERM, 1994

RUTH O. SHAW, *et al.*,

JAMES ARTHUR "ART" POPE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

RALPH GINGLES, *et al.*,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, Raleigh Division

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MOTION TO DISMISS OR AFFIRM OF APPELLEES RALPH GINGLES, *et al.*

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QUESTIONS PRESENTED

Intervenor-appellees Ralph Gingles, *et al.* do not agree that the broad and abstract questions described in the Jurisdictional Statements (at i) are presented to this Court in this case. Rather, the issues that the Court could decide (if it were to note jurisdiction) are framed by the extensive, specific, and amply supported factual findings made below. *On this record*, the only questions that would arise on appeal are:

1. Are the findings of fact of the district court clearly erroneous?

2. Do the appellants, who failed to present evidence sufficient to demonstrate that they suffered a concrete, personal injury as a result of the enactment of the challenged districting plan, have standing to bring this action based upon their mere assertion of abstract, subjectively perceived, stigmatic harm?

3. Did the district court err in holding that appellants had met their burden under *Shaw v. Reno* to establish that the challenged districting plan should be subject to strict scrutiny?

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Note on Citations

The following abbreviations are used throughout this Motion in citing to record documents in the case:

Shaw J.S.	Jurisdictional Statement, No. 94-923
Pope J.S.	Jurisdictional Statement, No. 94-924
J.S. App.	Appendix to Jurisdictional Statements

Note on Citations (continued)

Tr.	Transcript of trial, Spring, 1994
Stip.	Stipulations By the Parties (agreed to and signed by all parties March 21, 1994)
Def.-Int. Stip.	Stipulations Offered By Defendant-Intervenors (agreed to and signed by all parties March 21, 1994)
Exh.	Exhibits (including trial exhibits and exhibits to stipulations)
Dep.	Depositions received in evidence

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MOTION TO DISMISS OR AFFIRM OF APPELLEES RALPH GINGLES, *et al.*[1]

Appellees Ralph Gingles, *et al.* (defendant-intervenors below) respectfully request for the following reasons that this Court dismiss these appeals pursuant to Supreme Court Rule 18.6 because appellants have failed to prove the concrete injury necessary to establish their standing, or, alternatively, summarily affirm the judgment

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[1]Appellees Ralph Gingles, *et al.* are twenty-two white and black citizens and registered voters from throughout the State of North Carolina who were granted leave to intervene as defendants below following the remand of this action by this Court in *Shaw v. Reno*, ___ U.S. ___, 113 S. Ct. 2816 (1993).

below, which carefully applied the law as articulated by this Court in *Shaw v. Reno*, ___ U.S. ___, 113 S. Ct. 2816 (1993) and was based on findings of fact, unique to North Carolina, that are well supported by the record.

STATEMENT OF THE CASE

This litigation challenges North Carolina's 1992 congressional redistricting plan on the ground that it is a racial gerrymander lacking sufficient justification under the Fourteenth Amendment to the United States Constitution. In *Shaw v. Reno*, this Court held that appellants' complaint "state[d] a [facially sufficient] claim by alleging that [the plan] . . . rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. at 2828. In order to establish their entitlement to relief on remand, therefore, it was appellants' burden to demonstrate that the configuration of the districting plan did not result from the rational application of factors besides race and that the State had no sufficient justification for enacting the plan.

An extensive factual record was assembled on these issues in the district court. Most of the subsidiary historical facts were uncontested and the parties entered into a comprehensive set of stipulations. The parties consistently and fundamentally disagreed about the factual inferences to be drawn from the record evidence, however, and those disagreements, which were resolved by the trial court in appellees' favor, are central to these appeals. See Shaw J.S. at i (describing issue as whether court below "ma[de] clearly erroneous findings of fact"); Pope J.S. at 25 (arguing that the "factual analyses [below] are at odds with the record and are clearly erroneous"). Indeed, following the initial announcement of the ruling by the trial court, appellants filed motions pursuant to FED. R.

CIV. P. 52(b) seeking extensive supplemental and amended findings of fact; although some modifications to the opinion were made by the trial court (see Pope J.S. at 2), appellants (as noted) still quarrel substantially with the findings below.

The essential facts are set forth in the district court's opinion and summarized in the Motion to Affirm by Appellees, the Governor and other Officials of the State of North Carolina, which we do not here duplicate. In the Argument section *infra*, we touch upon many of the factual findings which it would be necessary for this Court to find "clearly erroneous" in order to reach the "questions presented" as they are framed by the appellants.

ARGUMENT

Were this Court to reach any of the legal issues sought to be presented by the appellants based upon the hypothetical versions of the facts described in their Jurisdictional Statements (which are contrary to the well-supported findings below), it should affirm the judgment of the trial court because the majority correctly understood the opinion of this Court and properly carried out the remand directions of this Court in this case, *Shaw v. Reno*, ___ U.S. ___, 113 S. Ct. 2816 (1993). See Motion to Affirm by Appellees, the Governor and other Officials of the State of North Carolina ("State appellees").

Those legal issues could appropriately be addressed by this Court, however, only if it were to set aside, as clearly erroneous, the detailed factual findings of the majority below. As the State appellees note, much of the extensive record in this matter was stipulated by the parties, and there is little if any dispute about the subsidiary historical facts relevant to this controversy.

Appellants principally contest the inferences drawn from the factual record. Because those inferences are also factual in nature, and because appellants cannot demonstrate (indeed, they have barely sought at all to do so) that they are "clearly erroneous" based upon the record, the issues sought to be raised by appellants in this Court are not actually presented by this case but are constructions which might have arisen had appellants' factual contentions not been rejected by the trial court.

In its prior ruling (*Shaw v. Reno*) this Court identified several distinct types of harms which might be caused by districting based solely upon race, and which, *if* suffered by a voter, might establish that voter's standing to challenge that districting plan in federal court. On remand, however, the appellants here failed to demonstrate, and the district court declined to find, that the districting plan in this case had in fact caused or was likely to cause any such injury. In the absence of such a showing and finding, appellants lack standing to maintain this action.

We urge that the judgment below either be summarily affirmed on the merits or be dismissed because appellants' lack of standing means that there is no federal jurisdiction over their claims.

I. THE DISTRICT COURT CORRECTLY RESOLVED THE FACTUAL ISSUES IN THIS CASE

The Jurisdictional Statements in this case reiterate the central factual contentions which the appellants advanced, but which the district court rejected, in the proceedings below. The Pope appellants repeatedly assert that "the district court's opinion contains numerous factual errors and misstatements which served in part as

the bases" for its decision (Pope J.S. at 25). The Shaw appellants similarly urge that "the majority below made numerous findings which have no evidence for support or are contrary to the overwhelming weight of the evidence" (Shaw J.S. at 30 n.45; see *id.* at 9 n.9, 10). These assertions and the more specific factual contentions of appellants discussed *infra*, reflect the intensely fact-bound nature of the instant appeal.

This Court, however, does not ordinarily note probable jurisdiction to consider such evidentiary arguments because its review is limited by FED. R. CIV. P. 52(a), which requires that the trial court's findings of fact must be upheld unless they are clearly erroneous. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 77-80 (1986) (applying "clearly erroneous" standard in direct appeal from decision of three-judge court in action under § 2 of Voting Rights Act); *City of Rome v. United States*, 446 U.S. 156, 183 (1980) (applying same standard in action under § 5 of Voting Rights Act).

> If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the [appellate court] may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently.

Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).[2] Deference must therefore be given to the findings of fact

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[2]This is true even where the lower court's findings do not rest upon credibility determinations. *Id.* The "clearly erroneous" standard applies to all factual findings, both ultimate facts and the subsidiary findings upon which they are based. *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982); *see also Gingles*, 478 U.S. at 78-79 ("clearly erroneous" standard applies to ultimate finding of vote dilution).

made by the court below, so long as there is evidence to support them. In this case, the many factual findings to which appellants object are all well supported by the evidence before the trial court.

(1) Appellants insist that North Carolina's decision to enact the challenged districting plan was *not* based on any belief that a plan with fewer than two majority-minority districts would fail to comply with § 2 of the Voting Rights Act (Shaw J.S. at 11 & n.11; Pope J.S. at 26). The district court, however, rejected appellants' contentions regarding this pivotal issue (J.S. App. 90a):

> Beyond any question . . . the dominant concern driving the decision [of the legislature] was a perception that . . . any . . . congressional redistricting plan which did not contain at least two majority-minority districts . . . would in fact violate the Voting Rights Act (or be so likely to violate the Act that in prudence it must be assumed to do so).[3]

The trial court's opinion contains a detailed analysis of the evidence supporting this finding (J.S. App. 90a-95a). The court concluded that the validity of the legislature's belief "was confirmed by objective evidence adduced at trial" (J.S. App. 93a).

At the very outset of the redistricting process, before any submissions had been made to the Department

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[3]See also J.S. App. 108a:

> The General Assembly did this in order to comply with §§ 2 and 5 of the Voting Rights Act, on the basis of the well-founded belief of a sufficient majority of its membership that failure to do so would, or might well, violate one or both of those provisions.

of Justice, the legislature received and accepted the advice of independent counsel that the state would be in violation of § 2 unless it created at least one majority-black district (J.S. App. 85a). The parties also stipulated that prior to enacting any plan, the legislature had before it a variety of proposals that would have created two majority-black or majority-minority districts (*see* Stip. Exhs. 10, 23, 49, 61; J.S. App. 85a-86a.)[4]

Members of the General Assembly had knowledge of the totality of circumstances surrounding congressional, statewide and state legislative elections in North Carolina. From their experiences as legislators during the 1980's they were aware that the original congressional redistricting plan drafted in 1981 had been denied § 5 preclearance because the exclusion of politically active black voters from then-District 2 appeared to have the purpose and effect of diluting minority voting strength. A majority had participated in redrawing state legislative districts after *Gingles* to remedy violations of amended § 2 of the Voting Rights Act. (J.S. App. 90a-92a.)

A large number of successful § 2 challenges had previously been brought in the counties ultimately included within the First and Twelfth Districts. Of the 27 counties in the 1st District, 22 are covered by § 5 of the Voting Rights Act; in the *Gingles* litigation, § 2 violations were found in 11 of those counties and, since *Gingles*, 21 counties and cities in the 1st District have been the subject of challenges which resulted in changes to the method of

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[4]After the Attorney General objected to the congressional districting plan initially enacted by the legislature in 1991, but prior to adoption of the 1992 plan challenged in this litigation, an alternative which would have created three majority-minority districts was introduced in the State House of Representatives. (Stip. Ex. 10.)

election. Two of the ten counties within which the 12th District is located are covered by § 5; in the *Gingles* litigation violations were found in both counties. Since *Gingles*, § 2 suits have resulted in modification of local election systems in four of the ten counties. (J.S. App. 107a.)

The district court found that members of the legislature knew from their "own personal experiences in North Carolina politics, that conditions in North Carolina were such that the African-American minority could likely prove many of the other factors that are relevant to establishing a § 2 violation under the statute's 'totality of the circumstances' approach" (J.S. App. 92a). This finding is supported by extensive evidence of current conditions that significantly impede the ability of African-American voters in areas covered by the challenged districts to participate effectively in the political process, including the use of at-large elections in the overwhelming majority of counties and cities (Keech Dep., Exh. 2, Tables 1A, 1B; Exh. 502, Statement of Delilah Blanks, at 5, 8 [Bladen County]); the difficulty that African-American agricultural or hourly workers experience in getting to the polls without suffering a loss of needed income (Exh. 502, Statement of James Sears, at 5 [Gates County], Statement of Alice Ballance, at 8-9 [Bertie County]); and the fears generated by threats of reprisals for any political independence (*id.*, Statement of Willis Williams, at 9-11 [Martin County]).[5] It is still difficult for black voters to secure meaningful assistance at polling places (Exh. 502, Statement of Delilah Blanks, at 7-8, Statement of Oscar Blanks, at 3-4

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[5]For example, as late as 1992, during the campaign of a black candidate for Martin County Commissioner, African-American voters were threatened with loss of credit at a local pharmacy if they supported him (*id.*, Statement of Willis Williams, at 9-11).

[Columbus County], Statement of Willis Williams, at 7-9, Statement of Alice Ballance, at 6-7). Black candidates have fewer financial resources and do not generally have access to the business and social contacts that have been politically indispensable for successful nominees (*id.*, Statements of Delilah Blanks, James Sears, and Alice Ballance).

Extensive evidence was presented to the district court of the continuing effects of long-maintained, massive racial discrimination against African-Americans practiced in North Carolina, including the current economic, educational and similar disadvantages disproportionately experienced by blacks in the state (see Def.-Int. Stip. Exhs. 1-26). The effects of these conditions are evident in the striking lack of black electoral success in statewide and other elections in North Carolina prior to implementation of court-ordered remedies under the Voting Rights Act.[6] It is undisputed that from 1900 until after the post-1990 redistricting, no African-American candidate was elected to the United States Senate, Congress, or any statewide non-judicial office, and only two such candidates succeeded in judicial contests prior to a redistricting occasioned by litigation (see Def.-Int. Stip. 60, 61). No black person was elected to the North Carolina General Assembly between 1900 and 1968, and at the time the *Gingles* suit was filed in 1981, there were only three African-American members of the House and one State Senator (Stip. 13, 18; Def.-Int. Stip. 77, 78). As the court below found, at the time the challenged plan was enacted "African-Americans were still not being elected to political office in the state in numbers ,even remotely

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[6]See *Gingles*, 478 U.S. at 48 n.15 (extent to which minority group members elected to public office is among most important "Senate Report" factors supporting finding of § 2 violation).

approaching their [22%] representation in the general population, despite the fact that capable and experienced African-American candidates were running for election" (J.S. App. 82a-83a, 92a).[7]

As this Court said in *Gingles*, 478 U.S. at 46, "[t]he essence of a § 2 claim is that a certain electoral . . . structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." The preceding discussion provides examples of the extensive record support for the legislature's conclusion in 1992 that a court would have been likely to find that black voters were not yet able to participate on an equal basis in the political process in North Carolina and to elect candidates of their choice (J.S. App. 92a-93a).

(2) The Shaw appellants insist there was insufficient white bloc voting in North Carolina to support a plausible § 2 claim (Shaw J.S. at 16 n.16). The district court properly rejected this contention, finding "considerable evidence" that white bloc voting persisted (J.S. App. 93a).[8] All of the examples cited in the Shaw Jurisdictional Statement pre-date this Court's *Gingles* findings of

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[7]In 1989 blacks were consistently underrepresented in local city and county positions, especially those chosen through at-large elections (see Def.-Int. Stip. 76, 80; Keech Dep., Def. Exh. 2, Tables 1-A, 1-B, 2-A).

[8]See *id.* at 91a-92a:

> Members of the legislative leadership stated in floor debate that they believed . . . that pervasive bloc voting by the white majority allowed it usually to defeat candidates supported by the African-American minority in districts that were not majority-minority.

§ 2 violations in North Carolina, and in each instance the black candidate referred to by the appellants actually lost the election in question (see Shaw J.S. at 19-20). The trial court also made findings, not challenged by appellants here, of continued race-based appeals to white voters (J.S. App. 92a, 93a-94a & n.57).[9]

(3) Both appellants assert, albeit with little further analysis, that black voters in North Carolina are too dispersed to form the basis of a "compact" district under *Gingles* (Shaw J.S. at 16; Pope J.S. at 10, 25). The Pope appellants, for example, argue that appellees failed to adduce "proof" that the black areas were compact, and that "the record demonstrated" a lack of compactness. (Pope J.S. at 7, 25). The district court, however, rejected appellants' assessment of the evidence (J.S. App. 93a):

> The overwhelming evidence established that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts. . . .[10]

The court noted that the Pope appellants themselves had prepared plans which included two majority-minority districts which "were 'geographically compact' under any

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[9]In the proceedings that led to the passage of the redistricting plan, State Senator Walker specifically referred to the use of racial appeals in the 1990 election for U.S. Senator, and their effects upon the electorate, in urging his colleagues to support the creation of two majority-minority districts (Stip. 95, Exh. 200, at 932).

[10]See also J.S. App. 91a ("Numerous plans presented to the General Assembly had demonstrated that the State's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts").

reading of *Gingles*" (*id.*).[11] The opinion below included detailed findings regarding the location of "major, discrete concentrations of African-American population" in specific cities and rural areas (J.S. App. 83a).

(4) The chain of events lending to the adoption of the challenged districting plan included a decision by the Department of Justice to refuse to preclear, under § 5, an initial plan that contained only a single majority-minority congressional district. The Shaw appellants now advance two slightly different factual arguments in an effort to undermine the significance of the Attorney General's § 5 objection as a factor supporting the legislature's belief that a plan with two majority-minority districts was required by the Voting Rights Act.

First, appellants urge that the Department expressly insisted that North Carolina adopt a racial "quota system" of representation, contending that the Assistant Attorney General for Civil Rights used the term "quota" in meetings with state officials (Shaw J.S. at 13 n.13). Second,

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[11] Appellants suggest that this Court's earlier opinion in *Shaw v. Reno* somehow contained a factual finding that blacks are so evenly distributed throughout the State of North Carolina that the compactness precondition of *Gingles* could never be met. But in *Shaw* this Court expressly held that the dispute regarding the compactness of North Carolina's black population was among the issues which "remain open for consideration on remand." 113 S. Ct. at 2831. Only a few years earlier, in *Gingles*, this Court had found that blacks in North Carolina *were* sufficiently concentrated to support a finding of liability under § 2 of the Voting Rights Act. The counties and black communities within which the two districts in the instant case are located are substantially the same as those involved in *Gingles* itself: the First Congressional District includes Northampton, Gates, Hartford, Bertie, Chowan, Edgecomb, Washington, Halifax, Nash and Wilson Counties, and the Twelfth District includes portions of Durham, Forsyth and Mecklenberg Counties. *See* 478 U.S. at 35 nn.1-2.

appellants interpret Assistant Attorney General Dunne's letter of December 18, 1991, denying preclearance of the earlier plan, as requiring "maximization" of majority-minority districts (*id.* at 14-15). But the district court emphatically rejected this account of the actions of and standards applied in this case by the Department of Justice.

The court below correctly concluded that in rejecting North Carolina's first plan, the Department of Justice had expressly applied, not the discriminatory effect aspect of § 5 or § 2, but the distinct prohibition in § 5 of election laws with a discriminatory *purpose* (J.S. App. 87a-88a) (emphasis added):

> On December 18, 1991, the Attorney General objected to . . . the [first] congressional redistricting plan . . . finding that the state had not met its burden, under § 5, of proving that the Plan did not have a racially-discriminatory *purpose*. . . . The letter concluded that the General Assembly's "decision to place the concentration of minority voters in the southern part of the state into white majority districts" appeared to be *designed* "to ensure the election of white incumbents while minimizing minority electoral strength."[12]

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[12]See *id.* at 51a n.29 ("[T]he Justice Department's denial of preclearance was . . . based . . . on the ground that the state had failed to meet its burden of demonstrating that the plan did not violate the 'purpose' prong of § 5 itself"); *id.* at 111a ("[T]he Justice Department had denied preclearance to [the first] plan on the ground that it failed to satisfy the 'purpose' prong of § 5"). The plausibility of this 1991 finding is supported by the fact that in 1981, under a different administration, the Attorney General had also disapproved, under § 5, a proposed congressional districting plan as racially motivated (J.S. App. 90a-91a n.55, 94a).

This finding renders largely irrelevant many of the arguments in the jurisdictional statements. Because the Justice Department's § 5 objection in 1991 was based upon a finding that the earlier districting plan was animated by a discriminatory intent to "minimiz[e] minority electoral strength," its emphasis on the legislature's devising a plan that would provide appropriate and effective opportunities for African-American participation in the election of members of Congress was completely unexceptionable; this Court has never suggested that remedies for intentional racial discrimination may not take race into account.

(5) Appellants seek reconsideration in this Court of the factual issue that was the particular focus of the proceedings on remand -- why the First and Twelfth Congressional Districts have the particular shapes noted in the Court's earlier opinion. Appellants contend that race was the sole consideration, while the State maintained below that the legislature's desire to create a distinctively rural First District and a distinctively urban Twelfth District, as well as to preserve the core areas of prior districts and protect incumbents, were of equal or greater significance. Appellants insist that the legislature had no such purposes (Pope J.S. at 23, 25 n.11; Shaw J.S. at 9 n.8, 30).

Again, the district court, in its findings, rejected appellants' contentions. For example, the court described the goals pursued by the legislature respecting creation of an "urban" and a "rural" district (J.S. App. 97a, 100a):

> [T]he redistricting committees adopted the convention that at least 80% of [the] population [of the First District] must be located outside cities having populations greater than 20,000 . . . [and] . . . a mirror-image convention to guide the Twelfth District's urban design: at least 80% of its total

population must be drawn from cities with populations of 20,000 or more.[13]

The court described contemporaneous testimony and legislative debates favoring the creation of such districts (J.S. App. 96a, 102a, 104a), and the fears expressed by rural residents of the Coastal Plain that their interests would be ignored by urban voters in a mixed urban-rural district (J.S. App. 96a-97a); it expressly credited supporting testimony of the Director of the Bill Drafting Division of the General Assembly (J.S. App. 81a & n.53).[14] The district court concluded that the intent to create such districts was a critical factor in the fashioning of districts that are considerably less regular in shape than would have been the case had the State sought solely to create two majority-minority districts (J.S. App. 102a, 109a).

(6) The Shaw appellants argue that the two challenged districts in fact are not, respectively, distinctively rural and urban (Shaw J.S. at 25, 26 & nn. 37-38). This argument completely ignores the findings of the court below (J.S. App. 82a, 83a, 96a-97a, 100a-105a) describing in detail the characteristics of the two districts, as shown by the evidence: The First District includes all four of the state's counties that have agriculture as their principal source of income and most of the state's counties that rank among the top ten producers of many different agricultural commodities, including tobacco, sweet potatoes, peanuts, hogs, cotton, and corn for grain (J.S. App.

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[13]See J.S. App. 109a (noting "legislative intention to create one predominantly rural (First) and one predominately urban (Twelfth) district").

[14]See Tr. 333-35, 343-44, 350-52.

103a).[15] In contrast, 86.3% of the residents of the Twelfth District, which is located in the industrial and commercial heartland of the State, live in urban areas (*id.*).[16] The district court concluded, based on a particularly extensive record, that residents of the First District, without regard to race, shared vital common interests in agricultural issues, while residents of the Twelfth had distinct common concerns with urban problems (J.S. App. 104a):

> [T]he two districts are among the most, rather than the least, homogeneous of the current twelve, in terms of the material conditions and political opinions of their citizens, whether only its white citizens, or only its African-American, or both together are considered.

African-Americans are not the only farmers in the rural 1st District, nor the only urban dwellers in the 12th, and appellants presented no evidence whatsoever for the proposition that the homogeneity of the districts results from their racial composition.

(7) Finally, the Pope appellants suggest that the North Carolina legislature could not have known that the First and Twelfth Districts were distinctly rural and urban, respectively, because certain 1990 census data was not yet available when the lines were drawn (Pope J.S. at 25). At the time the districting plan was enacted, however, state officials actually had detailed census data revealing the

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[15]Stip. 123.

[16]District 12 contains more banking institutions than any Congressional district in the nation apart from the district containing Wall Street in New York City (Tr. 932).

population down to the census tract level (J.S. App. 79a, 97a). The district court, moreover, properly concluded that the rural or urban nature of particular areas was a matter of common knowledge in North Carolina, particularly to state legislators who lived and campaigned regularly in those very regions (J.S. App. 82a, 102a, 104a n.58).

II. THE OTHER LEGAL ISSUES ADVANCED BY APPELLANTS ARE INSUBSTANTIAL ON THIS RECORD

The remaining arguments raised by appellants concern issues not presented by the opinion and judgment below or questions already definitively resolved by prior decisions of this Court.

(1) Both appellants urge the Court to address the legal and constitutional issues that might be raised if the Department of Justice were to utilize an unduly expansive interpretation of the "effect" prong of §§ 2 or 5 of the Voting Rights Act (Pope J.S. at 14-15; Shaw J.S. at 12-15). In the instant case, however, the Justice Department action was expressly grounded upon the "purpose" prong of § 5, and the appeal thus simply does not present such issues, which the district court explicitly did not decide (J.S. App. 51a n.29, 87a-88a, 109a).[17] See *supra* pp. 12-14.

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[17]See J.S. App. 51a n.29:

> [S]ince the Justice Department's denial of preclearance was not based on the ground that the proposed plan was in . . . violation of § 2, but on . . . the "purpose" prong of § 5 itself . . . [w]e need not address plaintiff-intervenors' argument that the Justice Department has exceeded its authority under § 5 by incorporating the § 2 "results" standard into a § 5 preclearance analysis.

(2) The Pope appellants assert that the district court gave insufficient weight to the particular shape of the districts in this case (Pope J.S. at 6-8). The shape of a challenged district is critical under *Shaw v. Reno* to determining whether a challenged plan should be subjected to strict scrutiny. But in the instant case the district court ruled *for* appellants on that threshold issue and in fact subjected the two challenged districts to that searching review (J.S. App. 7a, 110a). No purpose would be served by reanalyzing the evidence regarding an issue on which the appellants themselves already prevailed below.

(3) The Shaw appellants insist that the district court adopted an "implicit" holding that only black officeholders can adequately represent black voters (Shaw J.S. at 22). But the district court opinion contains no such holding; on the contrary, the court below stressed that the plan does not impose a rigid quota for African-American representation because, as is the case in other majority-minority districts in North Carolina, non-minority candidates can and have been elected from them (see J.S. App. 60a n.40, 108a). This is demonstrated by the past experience with majority-minority districts for State legislative seats: "Of the eight majority-minority House and Senate districts created to comply with § 2 of the Voting Rights Act pursuant to the judgment in *Gingles*, three are presently represented by whites . . ." (J.S. App. 108a). In the first Democratic primary under the challenged plan, a white candidate won the most votes in the First Congressional District and came within one percentage point of attaining 40% of the total vote, which would have resulted in his nomination (Stip. 129, Exh. 64, at 29).

(4) The Pope appellants complain that the court below assertedly erred in failing to recognize that "the *defendants* . . . have the burden of producing evidence

that remedial action was appropriate" (Pope J.S. at 21) (emphasis in original). But the district court placed precisely that burden on the defendants: "[T]he state's burden . . . is producing evidence that the plan's use of race is narrowly tailored to further a compelling state interest . . ." (J.S. App. 43a; see *id.* at 110a). Both appellants also urge the Court to note probable jurisdiction to decide which party in a case such as this bears the burden of proof as to the existence of a compelling state interest (Shaw J.S. at 29-30; Pope J.S. at 23). The district court expressly held that the defendants had indeed met that burden,[18] so a decision sustaining appellants' contention that the defendants bear that burden would not affect the outcome of the instant case.

(5) The Pope appellants insist that § 2 of the Voting Rights Act can never be invoked to justify a non-court-ordered districting plan; rather, they argue, a court can consider that provision of the Act only in a § 2 suit brought by blacks to challenge a districting plan favorable to whites (Pope J.S. at 10, 14, 16, 17). On this view, it would be unconstitutional for a state to comply voluntarily

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[18]See J.S. App. 111a-113a (emphasis added):

> *The state has adequately established* that it had a 'compelling interest' in enacting a race-based congressional districting plan . . . . *The state has adequately established* that the Plan creating the two remedial districts was 'narrowly tailored' . . . . First, *the state has demonstrated* that the Plan does not create more majority-minority districts than is reasonably necessary . . . . Second, *the state has demonstrated* that the Plan does not impose a rigid quota for African-Americans' representation . . . . Third, *the state has demonstrated* that the Plan is a remedial measure of limited duration . . . . Finally, *the state has demonstrated* that the Plan does not impose an undue burden on the rights of innocent third parties . . . .

with § 2; rather, a state would be obligated to violate § 2 knowingly and then await a court-ordered remedy. However, the Court's decision in *Shaw v. Reno* expressly recognized that a state would have a sufficiently compelling interest in voluntarily complying with the requirements of § 2, 113 S. Ct. at 2830.

(6) The Shaw appellants insist that race-based districting can *never* be justified by a compelling state interest and is thus unconstitutional *per se* (see Shaw J.S. at 17-18 & n.18). Every member of the Court in *Shaw v. Reno*, however, rejected that contention; the majority held that the "bizarre" districts described in the Court's opinion were not unconstitutional *per se*, but rather are subject to strict scrutiny.[19]

(7) The Shaw appellants argue against the remedial creation of majority-minority districts because "the mobility of the American population" means that such districts will benefit blacks who did not live in the area during past periods of discrimination and will affect newly arrived whites who did not perpetuate discrimination in that particular location (Shaw J.S. at 18). This Court was certainly aware when it decided *Shaw* that voters constantly move into and out of districts; it would not have directed an inquiry into the justifications for particular districts if it had thought that population mobility would automatically determine the outcome of any such analysis.

The attempt by appellants to import "innocent victim" concepts from other areas of the law would

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[19] *See, e.g.*, 113 S. Ct. at 2830 ("If appellants' allegations of a racial gerrymander are not contradicted on remand, the District Court must determine whether the General Assembly's reapportionment plan satisfies strict scrunity").

embroil this Court in definitional difficulties of almost unimaginable proportions. For example, the Court would have to determine who are "voters who had no connection with the past discrimination" (Shaw J.S. at 18). Would that category include only election officials who impeded the registration of African-American citizens in the past? legislators who enacted dilutive apportionment plans that were stricken under the Voting Rights Act? voters who elected the legislatures that enacted those plans? In this case, as noted above, the Attorney General objected to the initial 1991 redistricting plan adopted by the North Carolina legislature on the ground that it appeared to be *purposefully discriminatory*. That discriminatory act was not long in the past and was committed by a legislature for whose members it is likely that all of the appellants voted. Professor Shimm, for example, has resided in North Carolina for more than 34 years and at one time had been active in partisan politics (Shimm Dep. at 6-8).

More significantly, adoption of appellants' suggestion would completely eviscerate the Voting Rights Act, contrary to the clear Congressional purpose recognized and effectuated by this Court in a long line of decisions. Under appellants' approach, a finding that the political process is not equally available to minority voters, the bedrock finding that establishes a violation of § 2 of the Voting Rights Act, *Gingles*, 478 U.S. at 44, 80, is of no import. Appellants would require courts and legislatures to ignore these conditions, rather than remedy them, solely because the remedy may change the district -- *not dilute the vote* -- of a citizen who may not have resided within the jurisdiction at the time some discrete act of prior discrimination took place. Such an approach would effectively repeal the Act and finds no support whatsoever in the statute, its legislative history, or the prior decisions of this Court interpreting it.

(8) Finally, the Pope appellants contend that because congressional districting plans are ordinarily in effect for a ten-year period (until the next census), majority-minority districts are unconstitutional no matter how compelling the state's interest in creating them. See Pope J.S. at 20 ("[a] decade-long 'remedy' is not, by definition, a limited remedy"). To the contrary, any measure which automatically expires in a decade is operational for only a limited period of time. Whatever period of time might be thought appropriate in other contexts, a redistricting plan which remains in effect until the next census is surely appropriate. In analogous circumstances, notwithstanding the Equal Protection requirement of one-person-one-vote, the States are permitted to keep the same districts in use for a full decade after each census, despite the fact that population shifts invariably result in differences in district populations that would have been unconstitutional if present at the beginning of the period. *See Reynolds v. Sims*, 377 U.S. 533, 583-84 (1964).

(9) Appellants' other, equally insubstantial, contentions are addressed in the State appellees' Motion to Affirm.

III. THE APPELLANTS FAILED TO DEMONSTRATE AS A MATTER OF FACT THAT THEY WERE PERSONALLY INJURED BY THE DISPUTED DISTRICTING PLAN

> The party invoking federal jurisdiction bears the burden of establishing th[e] elements [of standing, including "injury in fact"] . . . . Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of

> proof, i.e. with the manner and degree of *evidence* required at the successive stages of the litigation . . . . [T]hose facts . . . must be "supported adequately by the *evidence* adduced at trial."

Lujan v. Defenders of Wildlife, 504 U.S. ___, 113 S. Ct. 2130, 2136-37 (1992) (emphasis added).

In the instant case appellants were obligated to prove at trial that the challenged districts had in fact caused at least one of the injuries described by this Court in *Shaw v. Reno*: (1) the state's overall districting plan diluted the votes of the group to which the plaintiffs belong, 113 S. Ct. at 2828, (2) the lines of the challenged district had the effect of "exacerbat[ing] . . . patterns of bloc voting", *id.* at 2827, or (3) the boundaries of that district prompted the officials elected from it to "represent a particular racial group," of which the plaintiffs were not members, "rather than their constituency was a whole," *id.* at 2828.

In the proceedings on remand the appellants did not, of course, claim North Carolina's districting plan diluted the votes of whites. *See Shaw v. Reno*, 113 S. Ct. at 2823. Nor did appellants contend that racial bloc voting has increased since the 1991 enactment of the districting plan at issue; to the contrary, the Shaw appellants maintain bloc voting in North Carolina is actually on the decline (see Shaw J.S. at 19-20). The appellants proffered some anecdotal opinion apparently intended to show that the Representative from the Twelfth District was unresponsive to the interests of whites, but the district court was not persuaded that any such injury had in fact occurred (J.S.App. 105a):

> [There is] no convincing evidence in the record that . . . these two districts have had or are having

> any significant adverse effect upon their citizens' interests in fair and effective representation -- in matters of voting or access to their elected representatives. Indeed, such evidence as there is on the matter predominates in the other direction.[20]

The district court acknowledged "that the plaintiffs have not even alleged, much less proved, the sort of 'injury in fact' required by" this Court's past standing decisions (J.S. App. 21a) but mistakenly believed that this Court in *Shaw* had tacitly revolutionized standing law, insisting that *Shaw* would not "countenance" requiring a plaintiff in a case such as this to "demonstrate that it has raised some sort of concrete and material injury to his political interest" (J.S. App. 25a n.13). Rather, it held (J.S. App. 26a): "[W]e understand *Shaw* necessarily to have *implied* a standing principle that accords standing to challenge a race-based districting plan to any voter . . ." (emphasis added).

Nothing in *Shaw*, however, purported to abolish, expressly or by implication, the requirement that a

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[20]See also J.S. App. 115a ([W]hite voters['] . . . voting rights have been in no legally cognizable way harmed by the plan"). Appellants present only snippets of leading cross-examination questions to "corroborate[]" their assertion that the Representative elected in District 12 views his mandate as being to represent only black voters (Shaw J.S. at 7 n.6). They do not provide this Court with the full context of Rep. Watt's remarks and explanatory testimony, which indicates that he is concerned about and responsive to constituents of all races within his district. See Tr. 936-45, 957-60, 995-1003; Exh. 502, Statement of Melvin L. Watt, at ¶¶ 16-18; see also Exh. 502, Statements of Ellen Emerson, Charles Lambeth, Jr., Jennifer McGovern, and Dr. Bernard Offerman (white voters in the 12th District who expressed satisfaction with representation of *their* interests being provided by Congressman Watt).

plaintiff show "concrete and material injury." Indeed, nothing in *Shaw* purported to address any general issue of standing law. The only question actually resolved in *Shaw* was one of substantive Equal Protection law,[21] and the Court expressly refused to note probable jurisdiction over a standing question raised by the Shaw appellants in their 1992 Jurisdictional Statement.[22] The majority in *Shaw* emphasized that increased bloc voting or official indifference to the interest of a distinct racial group were "harms . . . cognizable under the Fourteenth Amendment," 113 S. Ct. at 2828. Such an identification of the specific harms which, if *proven*, would establish standing, would have made no sense if the Court had meant to abolish *by implication* the longstanding requirement that there be any demonstrable harm at all.

The district court cited *Allen v. Wright*, 468 U.S. 737, 755 (1984), as holding that any "use of racial classifications *necessarily* inflicts 'stigmatic' injury" (J.S. App. 22a) (emphasis added). But *Allen* held precisely the opposite, insisting that a claim of stigma was sufficient to support standing only "in some circumstances" -- specifically, those in which a plaintiff had also been injured by denial of a

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[21]113 S. Ct. at 2832 ("Today we hold *only* that appellants have stated a claim under the Equal Protection Clause . . .") (emphasis added).

[22]See Jurisdictional Statement, No. 92-357, at i ("Do white voters have standing to seek relief from congressional redistricting which was intended by both the state and federal defendants to result in the election of minority persons to Congress from two majority-minority districts?"). In noting probable jurisdiction the Court directed that "[a]rgument shall be *limited* to the following question" (*viz.*, whether an intention to comply with the Voting Rights Act precluded a finding of discriminatory intent in the adoption of a districting plan). 508 U.S. __, 113 S. Ct. 653 (1992) (emphasis added).

concrete benefit accorded to others. 468 U.S. at 755. *Allen* stressed that a claim of stigmatic injury is never sufficient to support standing unless accompanied by proof of

> some *concrete* interest with respect to which respondents are personally subject to discriminatory treatment. That interest must *independently* satisfy the causation requirement of standing doctrine.

Id. at 757 n.22 (emphasis added). This Court rejected a stigma-based standing claim in *Allen* precisely because the plaintiffs there were not able to prove they had suffered some other concrete injury sufficient by itself to support standing. *Id.* On essentially identical facts the court below mistakenly reached the opposite result, recognizing that there was no "concrete and material injury" (J.S. App. 25a n.13), and then holding that an abstract claim of stigma was nonetheless sufficient by itself (J.S. App. 22a-23a).

In *Diamond v. Charles*, 476 U.S. 54 (1986), a pediatrician sought to defend the provisions of an abortion statute against constitutional attack in furtherance of his concern for "the standards of medical practice that ought to be applied to the performance of abortions," *id.* at 66. This Court held that that the doctor had no standing:

> Although Diamond's allegation may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the Illinois Abortion Law as written be obeyed. Article III requires more than a desire to vindicate value interests.

476 U.S. at 66. *Diamond* is controlling here. What appellants seek is to "vindicate [their] value interests" by having

the legislature adopt a redistricting plan that conforms to their personal interpretation of what the Equal Protection Clause requires, even though they cannot demonstrate that they have suffered any concrete injury.

In the circumstances of this case, the claim of "stigma" is particularly fanciful. The two appellants who live in District 12 apparently feel stigmatized by the fact that they live in a district intentionally created as a majority-minority district, even though white voters constitute 45.21% of the voting-age population. They do not claim, however, that they or any other *whites* were placed within District 12 on the basis of race. To the contrary, it necessarily follows from appellants' arguments that white voters were placed in District 12 either by happenstance or, at the very least, *in spite of*, and *not because of*, their race. *See Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). The remaining appellants are whites who live in majority-white districts; they are not, however, complaining that they have been stigmatized by being excluded from a majority-black Congressional district.

In the absence of Article III standing, neither this Court nor any other federal court has jurisdiction. Accordingly, *Allen v. Wright* and *Diamond v. Charles* require that the instant appeals be dismissed for want of federal jurisdiction.

IV. THE APPELLANTS FAILED TO MEET THEIR THRESHOLD BURDEN UNDER THIS COURT'S DECISION IN *SHAW V. RENO*

In *Shaw v Reno* this Court spelled out specifically the allegation which the appellants were required to substantiate on remand before the challenged congressional districting plan would be subject to strict scrutiny:

> that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood *only* as an effort to *segregate* voters into separate voting districts because of their race

113 S. Ct. at 2832 (emphasis added). That was precisely the allegation advanced by the Shaw appellants when this case was before this Court in October Term, 1992.[23]

On remand to the district court, however, the nature of the appellants' claim shifted dramatically.[24] First, the appellants declined to pursue any claim that the First and Twelfth Districts were "segregate[d]." The abandonment of that allegation was precipitated by undisputed evidence that (unlike the area excised from the city of Tuskegee in *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), which was 100% black), the First and Twelfth Districts were almost evenly integrated, 50.5% and 53.5% black, respectively (J.S. App. 108a, 113a). These two districts are in fact more evenly integrated than virtually any other congressional districts in the nation, and more integrated than any in modern North Carolina history,

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[23]*See Shaw*, 113 S. Ct. at 2823:

> What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed *only* as an effort to *segregate* the races for purposes of voting . . . without sufficient compelling justification.

[24]See J.S. App. 26a:

> Plaintiffs . . . contend that . . . strict scrutiny applies to any districting plan in which consideration of race is shown to have played a "substantial" or "motivating" role in the line-drawing process, even if it was not the only factor that influenced that process.

including the remaining districts in the challenged plan, all of which are heavily white. It is therefore not surprising that the Shaw appellants' Jurisdictional Statement conspicuously makes no mention of the specifically framed allegation of "segregation" which they pressed in this Court less than two years ago.

Second, neither appellant any longer contends that the boundaries of the First and Twelfth Districts "can be understood *only* as an effort to segregate voters" or to achieve any other racial purpose. All the judges below agreed that various aspects of the lines were in fact an effort to achieve non-racial goals, such as to create distinctively urban and rural districts, to preserve communities of interest, and to protect incumbents (J.S. App. 96a-101a, 109a, 121a n.6, 127a n.11); to the extent that the lines were drawn for such non-racial purposes, they obviously cannot be understood "only as an effort" to achieve some racial end. Far from attacking this finding, the Shaw appellants now embrace it; in their current Jurisdictional Statement they argue that the challenged districts are unconstitutional precisely because they are in part an effort to achieve *non*-racial goals such as incumbency protection, favoring particular prospective candidates, or "needl[ing] the president pro tempore of the Senate" (Shaw J.S. at 27). But the argument which the Shaw appellants now advance -- that the lines are invalid because they are *not* solely an effort to segregate voters -- is precisely the opposite of the position they urged on this Court barely two years ago.

Despite the failure of appellants to substantiate, or even reassert, the allegations that are the touchstone of the cause of action upheld in *Shaw v. Reno*, the district court mistakenly applied strict scrutiny to the districting plan. Under a standard more deferential to the important

State interests that shaped North Carolina's 1992 Congressional redistricting, that judgment is unquestionably correct. This Court should accordingly affirm the judgment below without reviewing the district court's application of the strict scrutiny standard.

CONCLUSION

For the above reasons, this Court should dismiss the appeal herein or summarily affirm the decision of the court below.

Respectfully submitted,

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